



**IT IS ORDERED as set forth below:**

**Date: January 10, 2008**

**Paul W. Bonapfel  
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

IN THE MATTER OF:	:	CASE NUMBER: 07-66047-PWB
	:	
ISMAEL RIOS,	:	CHAPTER 13
	:	
	:	JUDGE BONAPFEL
Debtor.	:	

**ORDER**

On November 5, 2007, the Court entered an Order [Docket No. 30] providing for confirmation of the Debtor's chapter 13 plan notwithstanding the Debtor's failure to comply with the credit briefing requirements of 11 U.S.C. § 109(h) because the Trustee had not timely sought dismissal due to ineligibility.

The Order identified six other bankruptcy cases in which the Debtor's attorney had filed

a petition on behalf of a debtor who had not received the credit briefing required by § 109(h) prior to filing. The Court expressed its disapproval of this practice and stated [Docket No. 30 at 8]:

The attorney's filing of a case on behalf of an ineligible debtor clearly subjects a debtor to legal jeopardy because of the prospect that the case should be and will be dismissed if a party promptly pursues dismissal based on ineligibility. In addition to subjecting the attorney to liability to the client for failure to provide competent representation, the practice may subject the attorney to sanctions or discipline.

After entry of the Order, the Debtor's attorney submitted a response [Docket No. 34] in which he asserts that the attorney for the chapter 13 trustee is "ignorant of the circumstances" of the cases handled by the attorney and that the cases the attorney generally gets are "'hard,' in that the estates are exceptionally complex, difficult, and daunting." Counsel further expresses his view that "the pre-filing briefing rule is more of a hindrance than a help and should be repealed."

The Court enters this Order to make it clear that, regardless of the difficulty or complexity of a case or the usefulness of the pre-filing credit briefing requirement of § 109(h), the requirement exists. Congress mandated it, and it is this Court's responsibility to enforce it. Consequently, it is counsel's professional duty to see to it that debtors he represents obtain it before filing or that the requirements of § 109(h) are otherwise met. Counsel seems to think that if he advises the client of the pre-filing requirement he can file the petition without determining whether the client in fact has obtained the briefing prior to filing. This practice does not comply with § 109(h) and will result in dismissal if eligibility is timely raised.

Appendix A of the attorney's response provides information about the cases cited in

the earlier order in which the Debtor did not receive a pre-filing credit briefing. Although none were dismissed for ineligibility, it is clear that the attorney did not properly deal with the § 109(h) requirement in any of them. The attorney's discussion of these cases indicates that he views compliance with § 109(h) as something that may be ignored and later excused.

Regardless of what occurred in any of the other cases, however, the circumstances of this case demonstrate that the attorney has a problem with regard to compliance by his clients with the requirements of § 109(h). Clearly, the attorney did not have in hand a certificate that the Debtor had obtained the required briefing when he filed the case. In the absence of a prepetition briefing, § 109(h) conditions the debtor's ineligibility on an exception; the only possibly applicable one under the facts here is § 109(h)(3), which permits filing without a prepetition briefing if exigent circumstances exist *and* the debtor requested the briefing prior to filing but could not receive it within five days.

When counsel (four months after filing of the case) invoked this exception on August 15 [Docket No. 25], the alleged exigent circumstance was the scheduled foreclosure of the Debtor's residence on May 1. This foreclosure date was well after both the date of the filing of the case (April 16) and the date on which the Debtor received the briefing (April 19). Thus, there was not, and could not possibly have been, any basis whatsoever for invoking the exigent circumstances exception in § 109(h)(3)(A). First, the filing of the case could have been delayed until April 20, after the Debtor had received the briefing, and still prevented the foreclosure. Second, the Debtor's ability to receive the credit briefing on April 19 proves that he could have received it within five days of a request for it.

The filing of a case under these circumstances indicates either a fundamental

misunderstanding of the requirements of § 109(h) or conscious indifference to its requirements. Such an approach is improper, unacceptable, and potentially dangerous to the attorney's clients. The Court cautions the attorney to conform his practice to the requirements of the statute and to provide legal representation that meets the minimum professional standards required of attorneys practicing in this Court.

It is important for the attorney to realize that § 109(h) applies even if a client does not contact an attorney until the day before the foreclosure date. If the prepetition briefing is readily available in this jurisdiction (as it appears to be), it may be difficult, if not impossible, for a debtor to demonstrate an inability to receive the briefing within five days of the request being made. In this regard, it is clear that exigent circumstances alone do not satisfy the requirements for the exception. If the attorney plans on relying on this exemption in future cases, he should be prepared to establish an evidentiary basis for the contention that a client could not obtain the required briefing within five days of a request being made. The Court notes that no effort was made to do that in this case: the attorney's client could not recall when he had requested or received the credit briefing.

It appears that, in other cases, lawyers with debtor clients having an emergency need to file a bankruptcy petition to avoid imminent foreclosure have been able to establish procedures so that their clients can promptly obtain the required briefing so that they are eligible for an immediate filing. In this regard, the Court notes that compliance with § 109(h) has become a non-issue in cases in which the debtor is represented by competent counsel. If the attorney here does not do likewise, it is foreseeable that, at some point, the eligibility issue will be timely raised and a client will end up with a dismissed case due to ineligibility and the

potentially disastrous consequence of the loss of a home or other collateral that might have been saved.

In the specific circumstances of this case, the fact that no party timely pursued dismissal based on ineligibility did not result in denial of confirmation, dismissal of the case, or any identifiable harm to the attorney's client. But the attorney can take no pride in this result because the ineligibility problem would never have been an issue if the Debtor had received competent representation to obtain compliance with § 109(h). The Court expects the attorney to demonstrate such competence in any future cases.

END OF DOCUMENT

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